

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7041

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-7041

RUDOLPH V. ALOSIO,

Plaintiff,

v.

IRANIAN SHIPPING LINES, S.A., et al.,

Defendants.

ATLANTIC STEAMERS SUPPLY CO., INC.
OF PENNSYLVANIA, et al.,

First Intervening Plaintiffs,

v.

IRANIAN SHIPPING LINES, S.A., et al.,

Second Defendants.

IRANIAN SHIPPING LINES, S.A.,

Cross-Claimant-Appellant,

v.

PETER MORAITES, et al.,

Impleaded Defendants-Appellees.

On Appeal from Summary Judgment Order of
the United States District Court for
the Southern District of New York
(Werker, J.)

REPLY BRIEF OF APPELLANT
IRANIAN SHIPPING LINES, S.A.

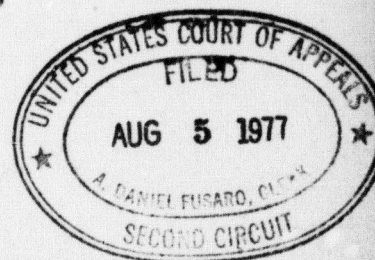
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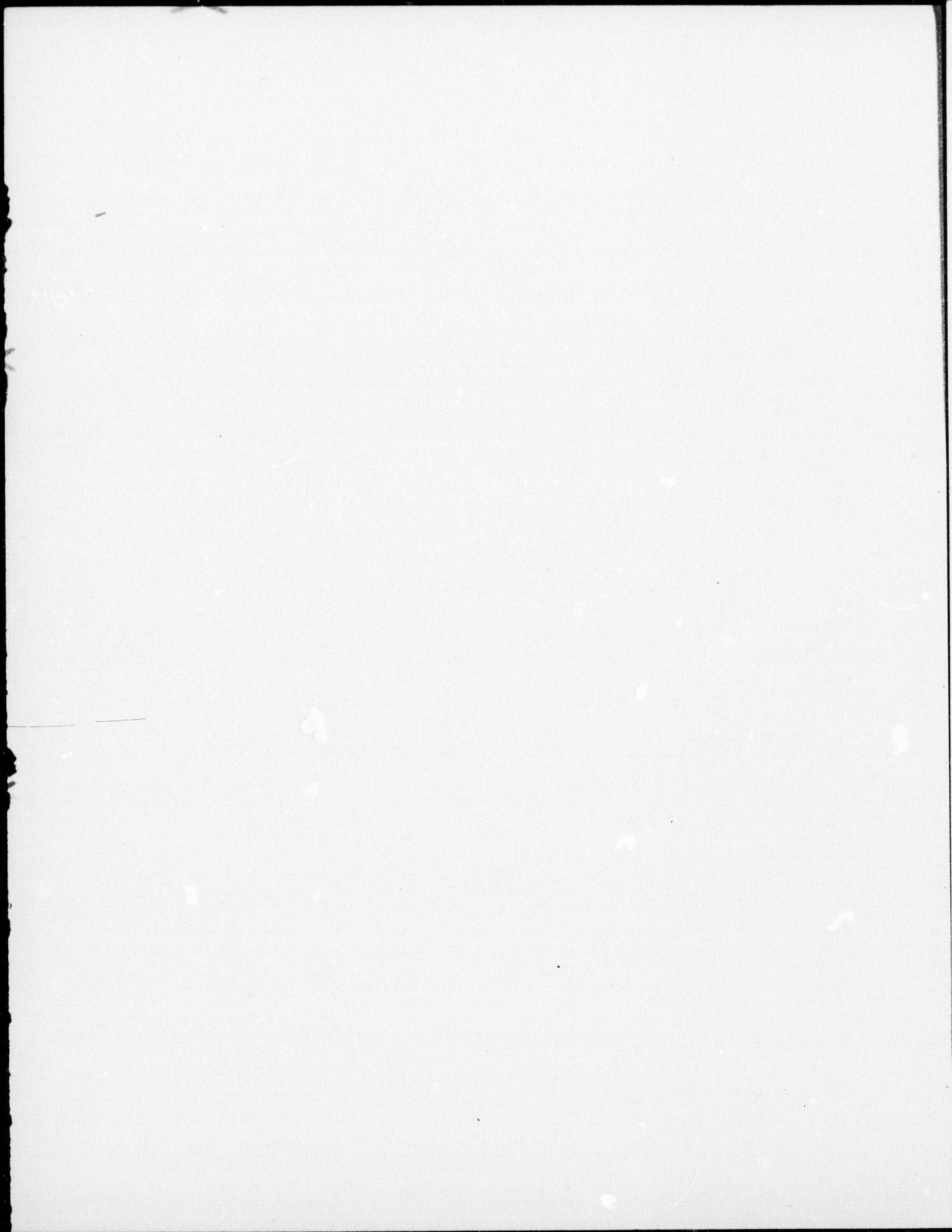
SHELDON ENGELHARD
Vladeck, Elias, Vladeck
& Lewis, P.C.
1501 Broadway
New York, N.Y. 10036

EUGENE GRESSMAN

1828 L Street, N.W.
Washington, D.C. 20036
(202) 466-8400

Counsel for Appellant
Iranian Shipping Lines, S.A.





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The Joint Brief of Appellees is deserving of reply only because it so starkly reveals the misconception about Rule 17(b) that permeates the decision below. This Court's decision in Joseph Muller Corp. Zurich v. Societe Anonyme De Gerance, 451 F.2d 727, 728 (C.A. 2, 1971), renders that misconception a reversible error.

Rule 17(b) provides that the capacity of a corporation to sue or be sued in a federal court "shall be determined by the law under which it was organized." And since the appellant ISL was organized as a joint stock company under the law of Iran, the law of that country determines whether ISL has the capacity to sue or be sued. It is at this point that the appellees and the court below depart from the plain meaning of the Rule 17(b) reference to capacity.

(1) The appellees' version of capacity. The appellees, like the court below, would equate a corporation's capacity to bring an antitrust suit in a federal court with compliance with the law of Iran governing liquidation proceedings instituted in Iran. As stated in appellees' brief (p. 15), "Perhaps, if dissolution proceedings had been commenced in Iran and a liquidator had been properly appointed in accord with that law, then that liquidation may have had capacity to prosecute claims" -- presumably, that is, claims like this antitrust claim in the federal court below. Moreover, appellees' acknowledgement that liquidation proceedings were possible under the Iranian Commercial Code, to the point where a liquidator "may have had capacity to prosecute claims," belies their counterstatement of the issue presented (Brief, p. 2). That counterstatement asserts that ISL "had been dissolved under the law of Iran which provides no saving statute

suspending the incidents of corporation death." Obviously, the liquidation procedures of the Code constitute just such a savings statute. And it is in that savings statute that the general capacity of a defunct Iranian company to sue or be sued is to be found.

(2) The appellant's version of capacity. The appellant ISL, on the other hand, has consistently maintained that "capacity" within the context of Rule 17(b) means a general capacity to sue or be sued, conferred upon a corporation by the law of the state of incorporation, regardless of whether that capacity has specifically been invoked or exercised for purposes of suing or being sued in the state of incorporation.

In other words, in this case, Articles 202-218 of the Iranian Commercial Code of 1932 (SA 457-459) confer a general capacity on a dissolved entity like ISL to sue or be sued in connection with winding up its affairs, discharging its obligations, collecting its debts and distributing its assets. Concededly, liquidators were not appointed in Iran to wind up any of ISL's affairs in Iran; apparently there was no occasion to do so.^{1/} The critical facts remain, however,

^{1/} It appears that ISL's sole remaining asset is its antitrust cause of action that was asserted in the federal court below.

that the Iranian Code at all times has recognized a general capacity on the part of ISL to sue or be sued in order to wind up its affairs and to collect its debts and assets. And there is no time limit imposed by that Code on the exercise of such general capacity.^{2/} All of that being true on the face of the Iranian Code, Rule 17(b) has been satisfied. ISL, as a dissolved joint stock company, has an unlimited general capacity to sue and be sued.

That conclusion has been fully confirmed by this Court in Joseph Muller Corp. Zurich v. Societe Anonyme De Gerance, 451 F.2d 727 (C.A. 2, 1971), cert. denied, 406 U.S. 906 (1972). The Court there affirmed that portion of Judge MacMahon's opinion, 314 F.Supp. 439 at 441, that held that the Rule 17(b) reference to "capacity" means only a "general capacity" under the law of the state of incorporation. In the words of this Court,

"We agree with the District Court's conclusion that Rule 17(b) deals only with the general capacity of a corporation

^{2/} Compare Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp., 302 U.S. 120, 122-123, 126 (1937), where the comparable Illinois statutes imposed a two year limit on the general capacity of a dissolved Illinois corporation to initiate any legal proceeding.

to sue or be sued . . . and that since both Joseph Muller and SAGA have such general capacity under the laws of the nations to which they owe their existence, the Franco-Swiss treaty would not constitute a bar to either of these suits if Rule 17(b) were the sole problem in this case." 451 F.2d at 728.

In support of that ruling, the Court cited two leading commentaries on federal practice and procedure:

(1) 6 Wright and Miller, Federal Practice and Procedure §1561, at 733-734 (1971), which states that Rule 17(b) "related only to following state law with regard to corporate capacity to sue and be sued"; and

(2) 3A Moore, Federal Practice ¶17.21 at 771 (2d ed. 1970), which states that "the law of the incorporating state determines its capacity" for purposes of Rule 17(b).

The principle thus enunciated in Rule 17(b) as to general capacity has long been in effect. In David Lupton's Sons Co. v. Automobile Club of America, 225 U.S. 489, 499-500 (1912), the Supreme Court held that where a corporation has capacity to sue in the state in which it was organized it could sue in the federal courts in another state, and that the forum state could not provide otherwise. That ruling suggests that in this case neither Iran nor New York can

disqualify ISL as an entity with general capacity to sue in the federal courts in New York on a federal cause of action. It is sufficient that Iran has recognized the general capacity of a dissolved corporation to sue and be sued.

This Court's decision in Muller further underscores the fact that, given the general capacity to sue supplied by the law of Iran, the exercise of that capacity should be controlled by the rules governing the invocation of federal cause of action. Here, as in Muller, an action has been brought under the federal antitrust laws, thereby bringing into play "a long standing public policy of the United States . . . which enjoys an overriding public interest and violations of which carry penal sanctions." 451 F.2d at 729. And here, as in Muller, trade and commerce to and from the United States are at the heart of the antitrust claims, and most of the parties and many of the overt acts are rooted in the United States.

In this antitrust context, it is unthinkable that the invocation of this "long standing policy of the United States" should be dependent solely on whether corporate liquidators have been appointed under the law of Iran to conduct liquidation matters in that foreign country. Indeed, it does not appear from the Iranian Commercial Code of 1932, or any other Iranian law cited by the appellees, that Iran has any prohibition against a defunct Iranian entity suing to collect assets in the United

States despite noncompliance with Iranian liquidation requirements. What public policy of Iran would dictate disallowing ISL to bring this antitrust lawsuit? Why should Iran be annoyed if a defunct Iranian company is permitted to collect its one major asset, for distribution to its creditors if not to its stockholders?^{3/}

In addition, the appellees' inability to "understand what ISL intends to argue in . . . respect" (Br., p. 20) to Spanos' capacity to manage the suit on behalf of ISL needs a few remarks. As articulated in appellant's opening brief (pp. 23-26), Judge Werker's memorandum decision, dated October 19, 1976 (App. 319-325), premised the determination that Spanos was not authorized to bring and manage this antitrust action on behalf of ISL on the law of Iran. It was his reading of the Iranian Commercial Code of 1932, which Judge Werker said "differs of course from the usual practice in the United States" and in New York in particular, that led him to conclude that "Spanos cannot continue its [ISL's] cross-claim against Arya and the other defendants."

Here again, Rule 17(b) contradicts the approach to this problem taken by Judge Werker. By common consent, Spanos was acting in a fiduciary or representative capacity in bringing this antitrust suit in ISL's name. That being true, Rule 17(b)

^{3/} It is axiomatic, of course, that Iranian law cannot be controlling as a matter of conflicts law so as to frustrate and defeat an important federal antitrust claim. See Drachman v. Harvey, 453 F.2d 722, 729 (C.A. 2, 1972).

plainly dictates that the capacity of an individual "acting in a representative capacity, to sue or be sued . . . shall be determined by the law of the state in which the district court is held." New York law thus becomes determinative.

Judge Werker's ruling in this respect, being premised solely on Iranian law, was plain error. And it was additionally in error in not applying, as the law of this case, Judge Brieant's earlier determination of September 29, 1972 (App. 147, 148), finding -- on the basis of forum law -- that Spanos' authority (received in 1964) to institute this antitrust suit was "still in force and effect" and, alternatively, he had "apparent authority" that had not be contradicted by facts. Suffice it to say that no new facts were presented to Judge Werker that would justify a departure from Judge Brieant's ruling. Mere affidavits quoting and applying the language of an irrelevant Iranian Commercial Code cannot qualify as facts demonstrating that, under the law of the forum made controlling by Rule 17(b), Spanos had somehow lost his authority to bring and manage this suit.

One other statement in the appellees' brief (p. 27) deserves refutation, the statement that ISL has raised a "novel suggestion for the first time before this Court" that ISL may "never have been a corporation at all." The record, however, demonstrates that this "suggestion" originated with the appellees

in the District Court, thereby raising a factual issue that should have precluded summary judgment. The record, in short, shows:

(1) The appellee Ayra submitted an affidavit by its Iranian law expert, Musa Sabi, that questioned whether ISL "ever validly existed" as a corporation (see App. 255); and

(2) In the course of requesting admissions of fact in 1976, the Manta appellees submitted to ISL an affidavit executed on April 20, 1972, by another Iranian law expert, Dr. Sotoudeh. App. 219. This affidavit, which had been previously obtained by the intervening creditor-plaintiffs, was based on certain factual assertions that had been made to Dr. Sotoudeh. Assuming the truth of those assertions, said Dr. Sotoudeh, ISL had not complied with various requirements of incorporation under the Iranian Commercial Code of 1932 and hence must be treated as a general partnership. As a result of the requests for admissions of facts that had been assumed by Dr. Sotoudeh, both ISL and the Manta appellees admitted facts that established that ISL had never been a corporation under Iranian law. It could only have been a partnership.

Right or wrong, these factual assertions and admissions should have been addressed and resolved by the court below before

rendering a summary judgment premised on the questioned and contradicted assumption that ISL was in fact a defunct corporation.

CONCLUSION

For these reasons, supplementing those in appellant's opening brief, the summary judgment entered below should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D.C. 20036

Counsel for Iranian Shipping
Lines, S.A.
Cross-Claimant-Appellant

Of Counsel:

SHELDON ENGELHARD
Vladeck, Elias, Vladeck
& Lewis, P.C.
1501 Broadway
New York, New York 10036

